

## **INTERNATIONAL COMMERCIAL LAW 2001**

### **II - Aug. 26      Formation of Sales Contracts, Commercial and Shipping Terms and Bills of Lading**

**Reading: Chapters 4, Parts 4.0-4.3 (excluding pp. 96-99,  
139-48, 154-57) and Part 4.5 (excluding pp. 222-25)**

#### **AGREEMENTS FOR INTERNATIONAL TRADING OF GOODS**

##### **INTERNATIONAL TRADING FACTORS**

###### **"Comfort" Factors**

- Buyer may not know Seller
- Seller has risk of not being paid
- Buyer has risk of not receiving goods
- No opportunity to inspect goods (quantity and quality)

###### **Risk Factors**

- Availability of Remedies
- Conflicts of laws
- Different legal systems
- Currency exchange
- Transportation
- Political factors

#### **TRANSACTION SEQUENCE AND INSTRUMENTS**

##### **SALES CONTRACT**

###### **Formation and Terms**

- Advertisement
- Pro Forma Invoice (Offer)
- Purchase Order (Acceptance) (Text, p. 54)
- Source of Contract Language

- Pre-printed Forms
- Trade Association Forms (one-sided)

Where does acceptance occur? What law applies?

Low-level employees bind the parties without any understanding of the impact

## Applicable Law Regarding Formation, Terms and Enforcement

Factors:

Parties' choice  
Statutes/Conventions  
Common Law  
Public Policy

U.S. Law - UCC -- Are you dealing with sale of goods?

2-207(1) - acceptance occurs even if it states terms "additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms".

2-207(2) - additional terms are deemed "proposals for addition to the contract", and are deemed accepted unless:

- (a) offer limits acceptance to its terms
- (b) they materially alter it
- (c) notification of objection is given within a reasonable time

2-207(3) - performance of parties may recognize a contract for sale even if writings do not do so. In such case the contract consists of those terms on which the writings of the parties agree, plus supplemental terms incorporated under the UCC.

(Note - supersedes common law view that inconsistent counteroffer rejects original offer, and first offeror's performance of counteroffer is an acceptance.)

## UCC "Gap Fillers"

Art. 2-314: Implied Warranty of Merchantability

Art. 2-315: Implied Warranty of Fitness for Purpose - applies where Seller had reason to know specific purpose of Buyer.

Art. 2-316: Exclusion or Modification of Warranties - Seller may make "reasonable" exclusions, if language mentions "merchantability", or Seller may expressly exclude all warranties, *e.g.*, "as is".

Compare German law (Text p. 85-7) - very close to old U.S. common law - "mirror image rule" - acceptance must match offer precisely. Performance after counteroffer is made constitutes acceptance of the counteroffer terms where good faith standards would have required an express rejection of undesired term.

CISG (Vienna Convention) - ratified by U.S. - has force of domestic U.S. law, displacing UCC where applicable. See 15 U.S.C. Appendix for Text.

CISG art. 1(1)(a) - Applies to contracts "between parties whose places of business are in different States [nations]" when both States are Contracting States [which have ratified CISG] unless excluded in the contract. When does CISG apply in absence of this "opt out"?

U.S. declares itself "not bound by Art. 1 subparagraph (1)(b)" of CISG - CISG does not "trump" UCC unless both parties are from contracting states. What language will preserve UCC over CISG?

CISG art. 10(a) - Domicile of parties: If party has more than one place of business, the place of business is the one with the closest relationship to the contract and its performance.

CISG art. 19(1) - Any acceptance containing "material" additions or modifications of original offer terms will operate as a rejection and counteroffer.

CISG arts. 35 and 36 - U.S.-style disclaimers of warranties (UCC Art. 2-316) will not necessarily work. Disclaimer is permitted under CISG, but different language is required to match the CISG's description of the code obligations being disclaimed (re: description of goods and expected use).

CISG arts. 31 and 67 - Risk of loss passes when goods handed over to first Carrier - may differ from UCC or INCOTERMS.

CISG allows parol evidence to be considered in interpreting contracts - contrary to U.S. rule.

CISG - 4-year statute of limitations: trial procedure and admissibility of evidence.

CISG art. 7(2) states that gaps in CISG are to be filled by reference to the "general principles" on which CISG is based, or in absence thereof, "rules of private international law." This usually means court or arbitrators will consider domestic commercial law of parties' states to fill gaps.

Other choice of law issues

Buyer's Remedies  
Consequential Damages  
Public Policy Issues

Force Majeure Clauses and Commercial Frustration

FM clauses informs usually drafted by trade association, favorably towards its members.

CISG art. 79 - Excuses performance where (i) impediment exists, (ii) it is beyond a party's control, and (iii) it was not reasonably foreseeable to the party. CISG art. 79 excuses either party from liability for any aspect of its performance.

Compare with UCC art. 2-615, which allows only the Seller to be excused from delay in delivery or non-delivery. However, UCC and U.S. common law which addresses both impossibility and impracticability, whereas CISG only covers impossibility. UCC art. 2-615: Seller excused if (i) Seller did not assume risk, (ii) non-occurrence of contingency was a basic assumption in contract, and (iii) occurrence of contingency makes performance commercially impracticable. Courts usually reject Sellers' arguments based on cost increases.

Compare UCC art. 2-712 (cover) and 713 (measure of damages) with CISG arts. 75 and 76. UCC allows cover, or damages based on market price when Buyer "learned of" Seller's breach. CISG art. 75 permits damages based on "price of the substitute transaction" if Buyer purchases goods "within a reasonable time". Timing can create major difference in damages calculation.

Effect on CIF contract performance; Example - cargo diversion under B/L with overcarriage clause.

## Choice of Law

### UCC art. 1-105

Parties may select the law of any state or nation to which the transaction bears reasonable relationship. In the absence of parties' agreement, UCC applies to transactions "bearing an appropriate relation to this state."

Compare Second Restatement Section 188(1): applicable law is the state with the "most significant relationship" to the transaction. Factors in Section 188(2) to be evaluated "according to relative importance" include:

- (a) place of contracting
- (b) place of negotiation
- (c) place of performance
- (d) location of subject matter of contract
- (e) domicile, residence, nationality, place of incorporation and place of business of the parties

## EEC Convention on Law Applicable to Contract Obligations (Treaty of Rome)

### Choice of Law

1. First choice is law selected by parties.
2. "Most closely connected" nation (similar to UCC and Restatement 2<sup>nd</sup>) - Section 4(2) of EEC applies law of country where party who is to render the "characteristic performance" has its headquarters, or where it is incorporated. General result is Seller's place of business.

EEC - includes post-contact factors

UK - as of contracting only

Law of place for "characteristic performance" -  
effectively means Seller's nation

Restatement 2<sup>nd</sup> Sections 189-207 (specific rules) -  
vague; little help, most refer back to Section 188.

(Note that U.S. experts disagree on how these rules apply.)

Internet

UNIDROIT Principles of International Commercial Contracts  
Restatement (Text pp. 98-9)

## SHIPPING TERMS

Controls point and time for passage of title and risk of loss, which party pays for inland freight (trucking/rail) handling and loading of cargo at the port, ocean freight and insurance charges, handling and inland freight at destination (Compare UCC arts. 2-319 and 320 with INCOTERMS, Text pp. 112-17).

FOB ("Free On Board") - FOB Plant or "Ex Factory" (INCOTERMS = EXW) - Seller tenders to Buyer goods to Buyer at Seller's place of business. Risk of loss ordinarily passes and Buyer responsible for all transportation costs. (Payment independent.)

FAS ("Free Along Side") or FOB Port or Place of Shipment - Seller must deliver goods to Carrier at the port. Buyer nominates the Carrier (or vessel) and pays cost of loading and ocean freight. Seller obtains Dock Receipt or "Received for Shipment" B/L. Seller pays export duties.

FOB vessel - Seller must deliver goods to Carrier, pay any cost of loading and Seller pays ocean freight and obtains "On Board" B/L for Buyer. (B/L may be Straight or Negotiable, depending on payment terms.) Seller has risk of loss until goods pass over ship's rail.

FOB destination (INCOTERMS = DDP) - Seller contracts with Carrier, pays all transportation costs, delivers goods to destination and there tenders them to Buyer. Seller has risk of loss until delivery to Buyer. (Rare)

CIF ("Cost Insurance Freight") (INCOTERMS = CIP) - Seller delivers goods to Carrier, pays Carrier's freight charges, obtains insurance, and obtains B/L for carriage of goods to destination. (May be Straight or Negotiable B/L and may be "Received for Shipment" B/L unless "On Board" B/L specified.) Seller has risk of loss until B/L and insurance obtained for Buyer.

C&F (Cost & Freight) - Same as CIF but Seller has no duty to insure for Buyer's benefit.

ICC (INCOTERMS) - Text pp. 112-17. Describes FOB and CIF in detail. INCOTERMS is more specific than UCC; INCOTERMS commonly used.

Distinguish CIF and C&F from contract of affreightment, time charter and voyage charter.

Issue - did Buyer agree to pay for goods or documents?

### BILL OF LADING (Example, Text, p. 64-5)

Two-party contract between Seller ("Shipper") and Carrier, assignable to Buyer ("Consignee"). Objective - substitute performance of trusted party for that of unknown party; substitute a negotiable document for an action.

Straight B/L - Carrier to deliver goods to Consignee or endorsee (does not work in Documentary L/C transaction; possession of B/L immaterial).

Sea Waybill - like a straight (non-negotiable) bill of lading except it is not a title document.

Negotiable B/L - can be transferred to Consignee or any third party - Carrier delivers goods to the bearer of B/L.

Proof of shipment - usually completes Seller's performance in FOB origin, FOB vessel, CIF and C&F transactions. (Note "on-board" B/L - Berisford case, Text p. 128.).

B/L must cover only exact goods covered by sales contract or Buyer can reject tender.

### B/L Terms & Concepts

Prepaid  
Collect  
Named vessel/carrier  
Received for Shipment B/L  
Clean on board, rated B/L  
Transshipment, deck cargo, etc.  
Dock receipt vs. B/L

Force majeure ("hostile acts of princes")

## Liner ("Common Carrier") vs. Tramp ("Contract Carrier") Service

Liner Tariffs

Containerization

Charter Party - Bareboat vs. Time Charters

COGSA - Carrier may not disclaim liability but may limit liability per package to \$500 unless Shipper declares higher value. (Compare Hague Rules - like Warsaw Convention, carrier's limitation does not apply if carrier commits wrongful act or was reckless as to cause of harm - proposed new COGSA terms would match Hague Rules.) Issue - what is the "package"?

Pomerene Act (U.S. Bills of Lading Act), 49 USC § 80110: Carrier obligated to deliver goods to consignee on straight B/L or bearer of negotiable B/L if consignee (i) offers to satisfy any Carrier lien (for freight), (ii) surrenders the B/L, and (iii) signs a receipt.

Uniform electronic B/Ls

Pomerene Act allows Carrier to state that it has not inspected goods and does not know contents of packages or nature or condition of contents - Carrier may take responsibility for weight and count only, and may state "Shipper's weight, load and count; container sealed by Shipper".

Effect on containerized traffic - Seller (Shipper) packs container at its factory.

Harter Act - B/L is prima facie evidence of Carrier's receipt of merchandise described therein, but COGSA allows Carrier to overcome this by "Shipper's count" notation.

Hague Rules (1924), Hague-Visby Rules (1968) (multinational convention; U.S. has adopted and implements through COGSA; applicability rules for shipments between adopting and non-adopting nations vary; most countries apply other country's rule to inbound cargo B/Ls and their own rules to outbound cargo B/Ls). (Note - Under Hague Rules, statements as to number of pieces, quantity and weight of cargo may not be disproved if B/L has been negotiated to third party.)

Carmack Amendment - Applies to carriage between U.S. and adjacent foreign country or to U.S. interstate commerce; allows two-tier carrier limitation of liability scheme; can apply COGSA \$500 package limit to portion of movement on the water and \$100 per package on inland portion.

Role of Freight Forwarder, Customshouse Brokers, Carrier Agents

### Handouts

Sale Contract  
Purchase Order  
CISG Summary  
Electronic Bill of Lading Diagram

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